INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Statutes:

Miscellaneous:

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 440

UNITED STATES, PETITIONER

v.

UTAH CONSTRUCTION AND MINING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings and opinions of the Atomic Energy Commission's Advisory Board on Contract Appeals (R. 78, 100, 126) and the Commission's Hearing Examiner (R. 64) are unreported. The order and memorandum of the Commissioner of the Court of Claims (R. 37) is unreported. The opinion of the Court of Claims (R. 142) is reported at 339 F. 2d 606.

JURISDICTION

The opinion and order of the Court of Claims were entered on December 11, 1964. Respondent's timely petition for reconsideration was denied on March 12, 1965. By order entered on June 10, 1965, the Chief Justice extended the time for filing a petition for a

writ of certiorari to and including August 9, 1965. The petition for a writ of certiorari was filed on August 9, 1965, and was granted on November 8, 1965 (R. 165; 382 U.S. 900). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).[1]

QUESTIONS PRESENTED

1. Whether factual disputes once administratively resolved pursuant to the standard disputes clause of government contracts may be tried *de novo* by a court in a suit for breach of contract.

2. Whether factual disputes underlying claims for breach of contract are generally subject to administrative resolution under the standard disputes clause of government contracts.

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act), 41 U.S.C. 321–322, provides:

> That no provision of any contract entered into by the United States, relating to the finality or

[1] Although the decision of the Court of Claims does not finally grant or deny relief, this Court has jurisdiction to review the decision under 28 U.S.C. 1255(1), which extends certiorari jurisdiction to "[c]ases in the Court of Claims." Pursuant to this provision and its predecessor, which conferred jurisdiction over "judgments and decrees of the Court of Claims," this Court has held that it would review interlocutory orders of the Court of Claims. *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155; see *Marconi Wireless Co.* v. *United States*, 320 U.S. 1. The decision of the Court of Claims in this case finally determines the right in issue—*i.e.*, the right to have the factual matters here involved determined administratively pursuant to the disputes clause rather than judicially. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148.

conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same as fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The contract (Exhibit A to the petition in the Court of Claims, R. 15) provided in pertinent part:

Article 3. *Changes.*

The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action,

may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*

Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 9. *Delays—Damages.*

If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any

extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government make take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day or delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract

with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 15. *Disputes.*

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

1. *Background.* This case arises out of a contract between the United States, acting through the Atomic

Energy Commission, and respondent Utah Construction and Mining Company, for the construction of structures at the Aircraft Nuclear Propulsion Project of the National Reactor Testing Station in Idaho. The contract was executed in March, 1953, at a price of $4,583,028.20 (R. 119). The contract contained a standard government contracts disputes clause, providing for the resolution of "all disputes concerning questions of fact arising under this contract" by the contracting officer and, upon timely appeal from his decision, by the duly authorized representative of the A.E.C., "whose decision shall be final and conclusive upon the parties." (R. 17, *supra*, p. 6). Work on the contract was completed on January 7, 1955 (R. 142).

2. *Administrative Claims and Proceedings.* During and subsequent to the performance of the contract, various disagreements arose between respondent and the A.E.C. Pursuant to the standard disputes clause in the contract respondent submitted to the contracting officer claims for relief flowing from these disagreements. The contracting officer resolved these claims—some favorably to respondent and some adversely to it (R. 52–56, 94–98, 121–124, 138–141). Respondent thereafter took appeals to the Advisory Board of Contract Appeals, the designated representative of the A.E.C. for hearing such appeals pursuant to the disputes clause. In 1957, while these administrative appeals were pending, all but four of the claims were settled (R. 38).

The remaining four controversies before the A.E.C. Board are referred to hereafter as the "pier drilling" claim, the "concrete aggregate" claim, the "shield window" claim, and the "shield door" claim. As to three of these four claims (the pier drilling, concrete aggregate and shield window claims) respondent sought administrative relief under the "changed condition" clause of the contract (Article 4, *supra*, p. 4), and the "delays-damages" clause (Article 9, *supra*, pp. 4–6). Under the changed conditions clause, the contracting officer is obliged to reimburse the contractor, and to grant additional time, for additional costs resulting either from subsurface or latent conditions differing from those shown in the contract drawings or specifications or from unknown conditions of an unusual nature differing from those ordinarily encountered in the type of work. The delays-damages clause requires extensions, and excuses the contractor from liquidated damages, for failure to complete his work on time, where delay results from specified causes beyond the control of the contractor. Under these clauses, respondent requested compensation for increased costs, including costs incurred by reason of delays caused by the government, and extensions of time.[3] As to the fourth claim, the "shield door" claim (R. 47, 127, 135), respondent sought relief under the "changes" clause of the contract (Article 3,

[3] In the pier drilling and shield window claims respondent sought time extensions, costs for extra work, and increased costs due to delays (R. 10, 79, 120, 121). In the concrete aggregate claim respondent apparently sought only increased costs for extra work, without any request for delay damages or extensions of time (R. 52, 74).

supra, pp. 3–4) which calls for an equitable adjustment in the contract price and time limits, if changes ordered in the drawings or specifications change the cost or time of performance. Here also respondent sought reimbursement for alleged additional costs and extensions of time.

Three of the four matters (the pier drilling, shield window, and shield door claims) were heard before a panel of the Advisory Board of Contract Appeals, consisting of Dean Robert Kingsley of the School of Law of the University of Southern California, and Edmund R. Purves, a consulting architect of Washington, D.C. The Board heard each matter in a full-dress adversary proceeding, with testimony, cross-examination, exhibits, briefs and argument. Where appropriate, the Board also viewed the construction site (R. 80–81, 102–103, 129). In regard to each matter, the Board ruled that its jurisdiction was clear and it rendered decisions, with full discussion and findings (R. 80, 102, 128; 78–93, 101–120, 127–137).

With regard to the pier drilling claim the Board found that there had been a "changed condition," but that this condition had caused neither delay in respondent's completion of the contract nor extra costs to respondent (R. 84; see R. 39). Accordingly, the Board denied respondent's requests for compensation for increased work and for delay, and for extensions of time (R. 92–93). In the shield window claim the Board found that there had been no changed conditions, but that the difficulties experienced by respondent, while caused to a large extent by its lack of knowledge and experience, were, in some measure, un-

foreseeable (R. 118–120). Accordingly, it granted extensions of time, but denied respondent's requests for costs and delay damages (R. 120). In the shield door claim the Board found that, as to most of the matters, there had been no change under Article 3; as to the two changes which it found had been made, the Board found that respondent had made no claim until over a year after the change, and that the contracting officer therefore did not abuse his discretion by refusing to waive the 10-day limitation on claims imposed by Article 3 (R. 133–134). Insofar as the request was one for a time extension, however, the Board treated it as one for an extension of time under Article 9, and granted partial relief (R. 136–137).

The concrete aggregate claim was heard on appeal from the contracting officer by a hearing examiner.[3] The contracting officer moved to dismiss the claim as untimely. The examiner ruled that the claim had been made three years after respondent became aware of the alleged changed condition, although the contract required that the contracting officer be notified "immediately" of such changed conditions (R. 65, 75–76). Respondent did not seek review of the hearing examiner's decision, as it could have under the Rules of Procedure in Contract Appeals.[4]

[3] Under the procedure then in effect, contract appeals were heard by a hearing examiner, with discretionary review by the Commission. 24 Fed. Reg. 726. Since then, the Commission has returned to the use of a Board for hearing contract appeals. 10 C.F.R. Part 3 (1965).

[4] Sections 3.30 and 3.31, 24 Fed. Reg. 726.

3. *Proceedings in the Court of Claims.* Respondent brought this action for damages in the Court of Claims by petition filed on January 6, 1961 (R. 1)—some 6½ years after the events in question took place.[5] The petition alleged generally that the government's delays, misrepresentations, and failures to perform the contract had caused increased costs on respondent's part (R. 1–4). More specifically, the petition charged the government with causing increased costs in connection with five phases of the contract, four of which are the phases involved in the administrative decisions summarized above.[6] Respondent alleged substantially the same basic facts as those underlying its administrative pier drilling, shield window, shield door and concrete aggregate claims. In regard to the pier drilling and shield window claims, respondent in addition substantially repeated the same monetary requests for relief which it had asserted administratively. In regard to the concrete aggregate and shield door claims, respondent sought increased costs due to delay which had not been asserted administratively (R. 4–11).

In the Court of Claims, respondent took the position that the controversies it was presenting to the court did not "arise under" the contract within the

[5] The events underlying the shield window claim took place in the summer of 1954 (R. 106). The events underlying the other three claims took place in the summer, fall and winter of 1953–1954 (R. 68–70, 83–84, 131).

[6] As to the fifth claim—the so-called "Amercoat Paint" claim—the Court of Claims decided that respondent's claim was barred by a release (R. 154–155). The correctness of that decision is not here in question.

meaning of the standard disputes clause contained in the contract (*supra*, p. 6) and hence that the facts underlying those controversies could be tried *de novo* by the court consistently with this Court's decision in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709. The government contended that the disputes did fall within the disputes clause; it also took the position that, in accordance with the *Bianchi* decision, the court should in no event conduct a trial *de novo* of relevant facts previously determined pursuant to proper administrative disputes procedures, but should, as to those facts, be confined to a review of the administrative record. The commissioner ruled that respondent was entitled to a trial *de novo* on all its claims, with the exception of one part of its pier drilling claim which did in his view fall within the disputes clause (R. 37–51).

The government sought review of the commissioner's order. The Court of Claims ruled that the language in the standard disputes clause providing an administrative remedy for "disputes concerning questions of fact arising under this contract," "means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract" (R. 145).[7] Thus, the court held that

[7] The court distinguished between the two kinds of claims in the following example (R. 148):

"For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days,

issues of fact underlying claims for "breach" of contract were not within the scope of the disputes clause. From this, the court thought it also followed that when facts had actually and properly been administratively resolved pursuant to the disputes clause, such administrative determinations should not be accorded finality in a suit between the parties when the same facts later became relevant in a suit for breach of contract. The court affirmed the commissioner's ruling that the pier drilling and shield window claims were primarily claims for "breach" of contract, and therefore ordered a trial *de novo* on the factual issues in these claims without regard to the administrative record and findings previously made on the relevant facts (R. 150–151, 152–153). Similarly, on the concrete aggregate claim, the court ruled that if the claim

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but his only recourse is an appeal to the head of the department whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter, so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

"But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute 'arising under the contract.' It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive."

was one for breach of contract, rather than one "arising under" the contract, the factual issues should be resolved in a judicial trial (R. 151–152). On the other hand, it ruled that the shield door claim was one "arising under" the contract under the disputes clause and was therefore not subject to a judicial trial *de novo* (R. 153–154).

Judge Davis dissented[4] on the ground that the administrative determination of factual disputes, properly made under the disputes clause after full hearing, should be binding upon the parties in subsequent actions for breach of contract. Judge Davis accordingly would have ruled that the facts which were actually found administratively on the pier drilling and shield window claims should not be subject to a second evidentiary hearing. In regard to any relevant facts pertaining to "breach" of contract claims which were not actually litigated and determined administratively, however, he agreed with the court that the contractor should have a judicial trial. Accordingly, he concurred in granting a trial on any relevant facts pertaining to the shield window claim which were not covered by the Board's supportable findings, and in regard to all of the facts on the concrete aggregate claim,[5] if that claim were to be viewed as a "breach" rather than an "arising under" claim, a matter on which he, like the majority, declined to express any opinion (R. 161–162).

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[4] Chief Judge Cowen separately concurred in the decision of the Court without reaching the issue on which Judge Davis dissented.

[5] The A.E.C. hearing examiner did not resolve the factual disputes as to this claim because of respondent's failure to present them in a timely fashion.

ARGUMENT

INTRODUCTION AND SUMMARY

The standard disputes clause of government contracts stipulates that "all disputes concerning questions of fact arising under this contract" are to be decided by the contracting officer with provision for appeal to an administrative board "whose decision shall be final and conclusive upon the parties." Such contracts also typically contain specific articles providing for administrative relief in many situations where the contractor complains, during the course of the contract, that he has been harmed either by the action of the government or by changed or unforeseen conditions affecting his performance of the work. In this case, for example, the contract contained a "changed conditions" clause (Article 4, *supra*, p. 4), requiring the contracting officer to reimburse the contractor, and to grant additional time for performance, for a broad range of unanticipated changed conditions affecting the contractor's performance. The contract also contained a "delays-damages" clause (Article 9, *supra*, pp. 4–6), requiring extensions of time for performance, and excusing the contractor from liquidated damages for delays, where delays in performance are caused by a range of specified conditions beyond the control of the contractor. Finally, the contract contained a "changes" clause (Article 3, *supra*, pp. 3–4), calling for an equitable adjustment in the contract price and in time limits set for the contractor's performance, where changes in the original contract specifications affect the contractor's costs or time of performance.

Pursuant to these contract provisions for administrative relief and the disputes clause, respondent, the contractor in this case, presented to the contracting officer and the appeal board a number of claims for reimbursement and extensions of time connected with the contract. Some of these claims were resolved in respondent's favor, others were not. In this Court, the case involves four claims arising out of separate aspects of the contract (the "pier drilling claim," the "shield window claim," and the "shield door claim" and the "concrete aggregate claim") which were not settled administratively in a way deemed satisfactory by respondent. Two of the claims (the pier drilling claim and the shield window claim) were rejected because the essential facts on which respondent premised his claims for relief were found against respondent's contentions. One claim (the shield door claim) was rejected both because most of the facts were not found in respondent's favor and because, as to those facts which were found to give rise to a claim for relief, respondent was found not to have made his claim in timely fashion. The fourth claim (the concrete aggregate claim) was rejected as wholly untimely without any findings as to the relevant facts.

Respondent thereafter brought the present suit for breach of contract in the Court of Claims based upon the same four aspects of the contract. As to the three claims where the contracting officer and the administrative appeal board had already made findings of fact pursuant to the disputes clause and respondent's administrative claims, respondent's claims were largely based upon facts already administratively

determined contrary to his allegations. As to these claims, the administrative findings of fact, if treated as final in the present suit, would generally require rejection of the judicial claims. Respondent also, in some instances, asserted in the Court of Claims facts as to damages caused by alleged delays which had not been determined administratively and which might become relevant if the facts already found were to be redetermined in respondent's favor. Finally, with respect to the "concrete aggregate claim," none of the relevant facts had been determined because that claim had been administratively dismissed as untimely.

The issues before this Court are essentially simple ones relating to the role of the Court of Claims in the determination of the facts underlying respondent's present claims. They are as follows: (1) where the relevant facts underlying respondent's claims in the Court of Claims have been previously determined administratively, whether they should be re-tried *de novo* by the court; (2) where facts may become relevant which have not been previously determined administratively, whether they should be determined in the first instance by the court or by administrative proceedings pursuant to the disputes clause. As to these issues the Court of Claims has held that all facts relating to claims for "breach of contract," *i.e.*, claims not directly invoking specific language in the three contract provisions for administrative relief described above, should be determined *de novo* by the court whether or not the identical facts have previously been, or could have been, determined administratively. In our view this was error for two basic reasons.

In the first place we believe that principles of finality, as applied to administrative determinations of fact relating to government contracts by this Court's decision in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, require that facts once properly administratively determined pursuant to claims for administrative relief not be re-examined *de novo*.

Secondly, we believe that the underlying premise of the Court of Claims' decision is erroneous. The court has refused to accord finality to administrative determinations of fact, and has asserted the right to make new determinations of fact, because of its view that the administrative fact-finding function under the disputes clause is a narrow one, limited to facts as they apply to claims for administrative relief bottomed upon specific clauses of the contract such as the "changed conditions," "changes" and "delays-damages" clause. In fact, however, the administrative fact-finding function under the disputes clause broadly applies to all facts of the kind committed to administrative determination by those clauses, whether or not they relate directly to claims under an express contractual clause. All of the facts in this case are of this kind. Thus, not only did the Court of Claims erroneously order a trial *de novo* upon facts previously administratively determined; it was also in error in suggesting that the administrative fact-finding process did not apply to facts, should they become relevant, which have not yet been determined in this case.

I

FACTUAL ISSUES ONCE ADMINISTRATIVELY RESOLVED PURSUANT TO THE STANDARD DISPUTES CLAUSE OF GOVERNMENT CONTRACTS MAY NOT BE TRIED *DE NOVO* BY THE COURT

The principal class of factual issues in this case upon which the Court of Claims has ordered its commissioner to conduct a trial *de novo* are issues which have been previously resolved administratively. As to these issues, the claims now presented in the Court of Claims for breach of contract depend upon facts already litigated administratively pursuant to claims for relief under Articles 3, 4, or 9 of the contract.

The facts underlying the pier drilling claim are illustrative of this class of factual issues.[10] Before the contracting officer and the Board, respondent claimed that the existence of loose or "float rock" not disclosed in the contract documents had hampered drilling and excavation for "piers" (foundations). This "float rock" was urged to constitute a "changed condition" under Article 4 of the contract, and compensation for increased drilling costs and increased costs of building construction due to delays, as well as a time extension, were sought under Articles 4 and 9. (R. 15–16, 77–98.) The Board found, after a full-scale adversary hearing, that respondent had in fact encountered subsurface float rock constituting a changed condition within the meaning of Article 4. This changed condition was found to have resulted

[10] Facts previously administratively resolved under similar circumstances are also involved in the shield window and the shield door claims.

in some increases in the costs of drilling and in some delay. The Board ruled, however, that the increased drilling costs had been incurred by a subcontractor—not by respondent; that respondent had not shown any liability over to the subcontractor for these costs; and that any delays caused by the float rock did not result in construction delays causing increased construction costs to respondent (R. 38–39). Accordingly, the Board denied respondent's claims for an extension of time and for increased compensation.

In the Court of Claims respondent made claims for "breach of contract" based upon the same delays and increased costs allegedly resulting from the existence of the "float rock." In its opinion, the Court of Claims described these claims as follows (R. 150):

> Plaintiff claims that in drilling and excavation for "piers," or foundation shafts for certain buildings, it encountered subsurface conditions differing materially from those indicated in the contract documents. First, it claimed additional compensation for the extra cost of drilling the "float rock" which it had encountered and which it claimed was not shown on the contract documents. * * *
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> * * * * *
>
> Plaintiff also claims damages for delay by reason of the refusal of the contracting officer to modify the contract on account of the changed conditions encountered. * * *

It is evident that the factual basis of the pier drilling claims thus presented to the Court of Claims was identical with facts previously determined by the Board in claims presented to it under Articles 4 and

9 of the contract. As to these facts, the Board determined that respondent had not itself suffered any increased drilling costs or construction delays by reason of the unexpected "float rock." Nevertheless, the Court of Claims has held, as to that part of respondent's claim which was for damages due to delay, that "[s]ince this is an action for breach of contract [rather than a dispute "arising under the contract"], the parties are not bound by the decision of the board and may introduce evidence *de novo* concerning any unreasonable delay" (R. 150). We submit that this decision, subjecting to trial *de novo* facts previously determined administratively in claims presented pursuant to the contract, was erroneous.

Trial *de novo* of factual issues previously determined between a contractor and the government is, in our view, precluded by both the disputes clause of the contract and the Wunderlich Act (41 U.S.C. 321) as those provisions were applied in this Court's decision in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, as well as by policies favoring finality and the orderly administration of disputes under government contracts.

1. The standard disputes clause, contained in the contract in this case, provides that "all disputes concerning questions of fact arising under this contract" shall be administratively determined by the contracting officer and Board, which administrative determination "shall be final and conclusive upon the parties * * *." The Wunderlich Act reiterates that such an administrative decision is to be "final and conclusive" unless it is "fradulent [*sic*] or capricious

or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (41 U.S.C. 321).

In *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, the Court considered the effect of these finality provisions upon the contention that a court, in a suit for breach of a government contract, may try *de novo* factual issues previously administratively determined pursuant to the standard disputes clause of that contract. As stated by the Court, the issue before it was whether, in a judicial suit on the contract "the court is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on such issues" (373 U.S. at 710). After a review of the language, history and purposes of the Wunderlich Act, the Court held that "apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a 'disputes' clause must rest solely on consideration of the record before the department" (*id.* at 714). The Court relied significantly upon the purpose of the Wunderlich Act to "'require each party to present openly its side of the controversy and afford an opportunity of rebuttal'" in the administrative proceedings (H. Rep. No. 1380, 83rd Cong., 2d Sess., p. 5). In the Court's view, "[t]his sound and clearly expressed purpose would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding. Moreover, the consequence of such a procedure would in many instances be a needless duplication of eviden-

tiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end" (373 U.S. at 717).

These principles are fully dispositive of the right of respondent to a trial *de novo* on the factual issues in this case which have previously been administratively resolved under the disputes clause pursuant to respondent's claims under Articles 3, 4 and 9 of the contract. Here the Board, after a full hearing, decided facts upon which respondent's subsequent judicial claims were based. For example, as to the "pier drilling claim," used as an illustration above, the Board decided that the drilling delays occasioned by the changed conditions had not caused respondent to incur construction delays in completing the contract. When respondent later asserted a claim for breach of contract in the Court of Claims based upon damages allegedly caused by construction delays resulting from the same changed conditions, respondent was not entitled to a second evidentiary hearing relating to the issue of whether construction delays had occurred. Under the disputes clause and the Wunderlich Act, this issue had been finally decided administratively subject only to judicial review for fraud or arbitrariness or for lack of substantial evidentiary support. Such limited review, under the *Bianchi* decision, "must rest solely on consideration of the record before the department" (373 U.S. at 714). The Court of Claims decision ordering a judicial trial *de novo* on this class of issues was therefore error.

2. The Court of Claims sought to avoid this result by holding that factual issues relating to a certain class of judicial claims for relief, namely, those for "breach of contract," must in all events be determined by a judicial trial *de novo* regardless of prior administrative proceedings resolving the same facts. It found such judicial claims to be present in this case. In the view of the Court of Claims, the facts underlying these claims for relief were subject to a judicial trial *de novo* because the claims were believed not to be amenable to resolution under the standard disputes clause. Since the court believed that these *claims* could not be administratively resolved, it held that the *facts* underlying the claims could also not be finally administratively resolved for purposes of the judicial suit. Thus, even though the facts upon which a claim was based had been previously litigated administratively pursuant to a claim—such as one for compensation or for extensions of time for "changed conditions"—over which there was clear administrative jurisdiction, the Court of Claims held that the same facts must be relitigated and redetermined *de novo* when they became relevant to a judicial breach of contract claim arising from the same changed conditions.

There are two reasons why this distinction is untenable. In the first place, even if the assumption were correct that the standard disputes clause does not generally confer administrative jurisdiction to resolve the facts underlying claims for breach of contract—an assumption which we dispute—that would provide no basis for the decision in this case. Regardless of the conceptual labels attached to successive

claims relating to the contract, all of the reasons given in this Court's *Bianchi* decision for according finality to administrative decisions of fact apply where facts are once litigated administratively pursuant to a proper administrative claim and a judicial claim later depends upon the same facts.

As the illustrative pier drilling claim shows, the same alleged facts (for example, alleged delays caused by unanticipated "float rock") may give rise either to a claim which can be framed as one for compensation and extensions of time under Articles 4 and 9 of the contract or to a claim which can be framed as one for "breach of contract" due to the failure of the contracting officer to modify the contract to account for the "changed conditions." Once the facts underlying either of these legal verbalizations of the claim have properly been determined administratively there is no reason whatever to undertake *de novo* litigation of those facts merely because the contractor arrives at a different legal formulation of a claim based on the same facts. As Judge Davis pointed out in dissenting on this issue below, the terms of the disputes clause and the Wunderlich Act, as well as the principle underlying the *Bianchi* decision and the general policy of collateral estoppel, mean that once an issue of fact is properly decided administratively, that decision, if supported, is to be "final and conclusive on the parties—not simply final and conclusive for a special purpose, but final and conclusive without qualification and without limitation. * * *

* * * * *

The Supreme Court made it plain [in *Bianchi*] that

Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In light of *Bianchi*'s evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies" (R. 159–160; emphasis in original).

That the *Bianchi* rule of finality thus does not depend upon the conceptual legal context in which facts are presented is, moreover, shown by the circumstances of the *Bianchi* case itself. In that case, a claim was first made for compensation under the "changed conditions" clause and rejected by the contracting officer and the Board. The contractor then brought an action for damages of "breach of contract" (373 U.S. at 711) in the Court of Claims, based upon the contracting officer's rejection of the changed conditions claim (just as in the pier drilling claim in this case illustrated above). Despite the change of legal theory involved—the same change involved in this case—the Court held that there was to be no trial *de novo* of facts previously properly decided administratively. In addition, courts of appeals have also uniformly given administrative findings of fact properly rendered pursuant to the disputes clause the finality accorded by that

clause and the Wunderlich Act, regardless of the conceptual nature of the judicial claim involved. See *e.g., United States* v. *Peter Kiewit Sons' Co.*, 345 F. 2d 879, 885–886 (C.A. 8); *Allied Paint & Color Works* v. *United States*, 309 F. 2d 133, 138 (C.A. 2), certiorari denied, 375 U.S. 813; *United States* v. *Hamden Cooperative Creamery Co.*, 297 F. 2d 130, 133–135 (C.A. 2); *Silverman Bros.* v. *United States*, 324 F. 2d 287, 289–290 (C.A. 1).

In addition, as a second reason for rejecting the Court of Claims distinction in this case, we believe that the court has erroneously construed the standard disputes clause as not generally applying to the resolution of facts underlying "breach of contract" claims. In our view, the disputes clause does generally apply to the resolution of such facts. We treat this second reason for reversing the Court of Claims' decision in the next section of this brief.

II

FACTUAL ISSUES UNDERLYING CLAIMS FOR BREACH OF CONTRACT ARE DISPUTES ARISING UNDER THE CONTRACT WITHIN THE STANDARD DISPUTES CLAUSE OF GOVERNMENT CONTRACTS, AT LEAST INSOFAR AS THE FACTUAL ISSUES ARE OF THE KIND CLEARLY COMMITTED TO ADMINISTRATIVE DETERMINATION BY THE CONTRACT

In the preceding section of this brief, we showed that policies of finality dictate that factual issues once properly resolved administratively should not be tried *de novo* in subsequent suits for breach of contract whether or not the standard disputes clause is construed to extend generally to the resolution of facts underlying claims for breach of contract. There is an additional reason for rejecting a judicial trial *de novo*

of the factual issues in this case. The Court of Claims' decision refusing to accord finality to the administrative determinations here proceeds on the premise that there is in fact no administrative jurisdiction generally to resolve factual issues underlying claims for "breach of contract." In the court's view, administrative jurisdiction extends only to the resolution of facts pursuant to claims under contract clauses such as those for "changed conditions," "changes" and "delays-damages" (Articles 3, 4 and 9 in this case) where the right to administrative relief is clearly specified. No such clause specifies a right to obtain administrative relief for "breach of contract." Since the Court of Claims believed that the administrative process therefore could not directly resolve factual disputes underlying breach of contract claims, it believed that administrative findings of fact pursuant to administrative claims should not be permitted indirectly to resolve such breach of contract disputes.

The Court of Claims' premise is, we submit, erroneous. In our view, questions of fact underlying claims for breach of contract can be resolved under the standard disputes clause, at least where those facts (as they are in this case) are of the kind similar to those committed to administrative determination by contract clauses such as those according administrative relief for "changed conditions," "changes" and "delays-damages." We ask the Court to resolve this issue here, not only because it provides the premise for the erroneous refusal of the Court of Claims to accord finality to administrative determinations in this case, but also because the scope of the disputes clause

is a recurring issue of substantial importance. In addition, we note that two of the claims in this case—the concrete aggregate claim and the shield window claim—potentially involve undecided factual issues as to which the right to judicial trial may ultimately depend upon the scope of the disputes clause. In the concrete aggregate claim, none of the facts underlying the judicial claim for breach of contract have been decided, because the administrator has held the claim to be time barred (R. 64–76). If the claim is ultimately held not to be time barred, and if the claim is deemed by the Court of Claims to be one for "breach of contract," rather than under one of the specific contract clauses, the Court of Claims will accord a judicial trial on the relevant facts unless this Court holds that the disputes clause is applicable to resolve these facts. In the shield window claim, which the Court of Claims has already held to be one for breach of contract (R. 152–153), the court has held that there must be a judicial trial on any relevant facts which have not yet been developed administratively (*ibid*). This decision is also erroneous if, as we contend, the disputes clause is the vehicle for the resolution of such factual issues.

1. A claim for "breach of contract" involves an assertion of rights and duties created and defined by the contract. In this case, for example, respondent asserts that the government failed to fulfill duties imposed upon it by the contract. Since the rights and duties which govern the claim are created and defined by the contract, we believe that the factual disputes pertaining to the claim are disputes "arising under"

the contract amenable to resolution under the standard disputes clause of the contract.

The phrase "arising under" in the disputes clause is a phrase commonly used to define jurisdiction. The "federal question" jurisdiction of the district courts, for example, turns upon whether "the matter in controversy * * * arises under the Constitution, laws, or treaties of the United States" (28 U.S.C. 1331).[11] It is settled that a matter in controversy thus "arises under" federal law if a right created or controlled by federal law is an essential element in the cause of action. *Peyton* v. *Railway Express Agency,* 316 U.S. 350, 352–353; *Gully* v. *First National Bank,* 229 U.S. 109, 112–113; *American Well Works* v. *Lane & Bowler Co.,* 241 U.S. 257, 260. Similarly, we believe that the language "all disputes concerning questions of fact arising under this contract" can be applied to facts underlying all asserted rights and duties created by the contract—including the assertion of remedies for "breach of contract."

The majority opinion of the Court of Claims, however, distinguishes between factual disputes concerning "the rights of the parties given by the contract"—which it regards as the only disputes "arising under" the contract—and disputes "over a violation of the contract"—which it considers to be "breach of contract" disputes outside the coverage of that clause (R. 145). It is not clear exactly where the Court of

[11] See also, 28 U.S.C. 1338 (civil action "arising under" patent, copyright or trademark statutes); 28 U.S.C. 1339 (civil action "arising under" postal statutes); 28 U.S.C. 1340 (civil action "arising under" revenue statutes).

Claims would draw the line between the two types of disputes. In some opinions the Court of Claims takes the position that the disputes clause is confined to disputes relating to other clauses in the contract which authorize the contracting officer to give the contractor specific relief in defined circumstances—as, for example, Article 3, which requires the contracting officer to adjust the terms of the contract to meet changes in the drawings or specifications, Article 4, which requires him to modify the contract for "changed conditions", or Article 9, which requires him to extend the time for performance if the contractor is delayed through no fault of his own (R. 15–17). The argument is that the disputes clause merely provides an appeals procedure to be followed after the contracting officer has made a decision under such a clause of the contract. Thus a dispute would "arise under" the contract if the contract (apart from the disputes clause) specifically authorizes the contracting officer to accord relief; otherwise, the dispute concerns a "breach of contract." See, *e.g.*, Judge Davis' dissenting opinion below (R. 156); *Morrison-Knudsen Co.* v. *United States*, 345 F. 2d 833, 837 (Ct. Cl.).[12] Under this narrow definition of the scope

[12] We note that the foregoing explanation of the "breach claim" "contract claim" distinction is not sufficient to explain all that court's decisions. For there are several situations where the relief given by the Court of Claims under a "breach of contract" theory duplicates the relief available to the contractor under various standard contract clauses. For example, the Court of Claims holds that the contractor's claim for expenses caused by inaccuracies in the contract documents drafted by the government is a "breach" claim. *Potashnick* v. *United States*, 123 Ct. Cl. 197, 218–20, 105 F. Supp. 837,

of the disputes clause, as applied by the Court of Claims in this case, a party denied administrative relief under a specific clause need only assert that the government's conduct underlying his request for relief was unreasonable in order to transmute a claim "arising under" the contract into one for "breach." For, in the Court of Claims' view, a claim that conduct entitling the contractor to relief under a particular clause was unreasonable, is not a claim for relief under that clause (see R. 148).[13]

The Court of Claims has also defined "breach" claims, as distinguished from those "arising under" the contract, as claims for unliquidated damages. *Continental Illinois Nat. Bank & Trust Co.* v. *United States,* 121 Ct. Cl. 203, 246, 101 F. Supp. 755, 759,

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839 (1952). Yet identical relief is available to the contractor under the standard "changed conditions" clause, which requires the contracting officer to modify the contract to reflect cost changes resulting from sub-surface or latent conditions differing materially from those shown on the drawings or specifications (R. 15–16). For other examples of "breach of contract" relief duplicating relief which the contracting officer is specifically authorized to give by the contract, see n. 18, *infra*, p. 37.

[13] The Court of Claims' interpretation, in addition, requires that the words "arising under" be read to refer to "disputes" rather than to "questions of fact." This reading runs counter to the Wunderlich Act (41 U.S.C. 321) which refers to contracts requiring administrative decision of "a dispute involving a question arising under such contract." The pre-Wunderlich "all disputes" clause similarly covered "all disputes concerning questions arising under this contract." *United States* v. *Holpuch*, 328 U.S. 234. The present express limitation of the clause to "questions of fact" was intended only to preclude any finality to administrative determinations of questions of law, in accordance with the Wunderlich Act.

certiorari denied, 343 U.S. 963. But surely the question of whether a factual dispute is one within the disputes clause should not turn on the kind of damages which a claim seeks. Again, this would give the party asserting the claim the choice of proceeding administratively or judicially according to the way in which he formulates his claim.

2. These distinctions drawn by the Court of Claims between "breach" claims and "contract" claims frustrate the purpose of the disputes clause, by giving it an arbitrarily narrow application. This clause, drafted in substantially its present form in 1926, was designed to provide an expeditious means of settling disputes arising between contractors and the government. The clause "creates a mechanism whereby adjustments can be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created." *United States* v. *Holpuch Co.*, 328 U.S. 234, 239. See, generally, Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law and Contemp. Probs. 39, 42–57 (1964).

One of the purposes of the disputes clause is to make sure that the contractor continues to perform the work of the contract, which in many instances is important to defense or other essential governmental purposes, while the dispute is being resolved. The disputes clause expressly provides that "[i]n the meantime the contractor shall diligently proceed with the work as directed." Yet if the Court of Claims is correct in believing that all claims for "breach" are outside the coverage of the clause, the contractor

would be free to stop work and bring suit for "breach" on claims which do not conceivably justify a work stoppage—for example, a claim that the contracting officer has unreasonably refused an extension of time. Government procurement officers would be astonished and dismayed by this result, as would most contractors. Yet it follows logically from the position adopted by the Court of Claims in this case.

From the standpoint of providing an expeditious administrative process for settling factual disputes, we submit that it makes no difference whether a dispute is a "breach" claim or an "arising under" claim, within the meaning of the Court of Claims' distinction. In either situation, the questions of fact are likely to involve complex technical details; in either case, a judicial trial of the factual questions involved is as likely to be expensive, time-consuming, and disruptive of the continuing relationship of the parties; in either case, it is in both parties' interest to provide for expeditious settlement. For example, the classic kind of "breach" claim under the dichotomy drawn by the Court of Claims is a claim for damages due to delays to the contractor unreasonably caused by the government.[14] In such a claim, the critical factual dispute is usually whether the delay was the responsibility of the contractor, or was the fault of unreasonable conduct on the part of government officials.

[14] See the example given by the majority in this case (R. 148). See also, *e.g.*, *Langevin* v. *United States*, 100 Ct. Cl. 15, 29–31; *Anthony P. Miller, Inc.* v. *United States*, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212; *Continental Illinois Nat. Bank & Trust Co.* v. *United States*, 126 Ct. Cl. 631, 115 F. Supp. 892.

On the other hand, the Court of Claims would hold that a claim for an extension of time, or for relief from liquidated damages under the standard "delays—damages" clause (Article 9, R. 16–17 in this case), involves factual questions "arising under" the contract, within the disputes clause.[15] The critical factual issue in such claims is also whether the delay was caused by matters within the control or responsibility of the contractor, or by "acts of the Government" or other factors not subject to his control. Similarly, another classic "breach of contract" claim, under the dichotomy drawn by the Court of Claims, is a claim for misrepresentation, based upon the assertion that the specifications and drawings for the contract did not accurately reflect latent conditions, or the work to be done.[16] Yet factual disputes about the accuracy and adequacy of the specifications are also the heart of controversies underlying claims for equitable adjustments under the standard "changes" and "changed condition" clauses (here Articles 3 and 4, pp. 3–4, *supra*), claims which this Court has ruled,[17] and which the Court of Claims recognizes, arise under the contract.

The particular facts of this case provide further examples of identity or similarity of factual issues underlaying "breach" and "arising under" claims. For example, in the shield window claim, the Board

[15] *Palumbo* v. *United States*, 125 Ct. Cl. 678, 113 F. Supp. 450; *Union Paving Co.* v. *United States*, 126 Ct. Cl. 478.

[16] *Potashnick* v. *United States*, 123 Ct. Cl. 197, 218–220, 105 F. Supp. 837, 839.

[17] *United States* v. *Callahan Walker Construction Co.*, 317 U.S. 56.

had to decide whether the difficulties which respondent encountered in assembling and installing the shield windows were a result of its own incompetence or were the result of faulty design attributable to the government's specifications (R. 101–120). This decision was relevant to the contractor's contention that its difficulties were the result of "changed conditions," entitling it to an adjustment of the contract price, and to extensions of time relieving it of responsibility for liquidated damages under the "delays—damages" clause (R. 101–102, 108). However, if the Court of Claims passes *de novo* on respondent's allegations regarding the shield windows—as it proposes to do (R. 152–153)—it will have to decide the same or closely similar issues, *i.e.*, whether the delays which respondent encountered in assembling and installing the windows were caused by unreasonable delays on the government's part in approving shop drawings, by unreasonable rejection of windows that should not have been rejected, or by excessive and unreasonable inspection. Both the "breach" claim which the Court of Claims proposes to decide *de novo*, and the "contract" claim which the Board decided, involve detailed inquiry into the technical problems of shield windows and the adequacy of the various shop drawings and specifications for shield windows which were drawn up under the contract. This sort of inquiry is precisely the kind which the disputes clause was designed to cover.

3. The holding of the Court of Claims violates the purpose of the disputes clause in another way. In any case where the contractor can frame his claim in

terms of "breach" of contract under the court's rule, he has the opportunity of relitigating factual disputes that have already been decided administratively, pursuant to the disputes clause. The result is a "duplication of evidentiary hearings" which imposes "a heavy additional burden in the time and expense required to bring litigation to an end." *See United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 717. The administrative hearing, intended by the parties to provide an expeditious means of resolving disputes, becomes instead merely an added step on the way to court—a step which prolongs and makes more expensive the ultimate resolution of the controversy.

The present case is not merely an isolated example of the waste and duplication which has resulted from the distinction drawn by the Court of Claims between "breach" claims and "contract" claims. Contractors' counsel have exercised considerable ingenuity in framing complaints which state as "breach" claims disputes which they have previously litigated under the disputes clause, and the Court of Claims has been generally inclined to support these efforts and to allow retrials of cases which have been decided administratively under the disputes clause.[18]

[18] For example, in *Saddler* v. *United States*, 152 Ct. Cl. 557, 287 F. 2d 411, the contracting officer issued a change order doubling the size of the levee which plaintiff had contracted to build. Under the standard "changes" clause, providing for a contract price adjustment where the contracting officer makes changes within the general scope of the contract, the contractor obtained a price adjustment to reimburse it for additional expense caused by the change. Dissatisfied with the size of the adjustment, the contractor then sued in the Court of Claims, alleging that the change order was not within the general

It is true that some of the waste and duplication involved in the Court of Claims' distinction would be avoided if the position urged in the first part of this brief were adopted, *i.e.*, that well-supported administrative findings as to issues actually litigated under the disputes clause are binding on the parties in the litigation of "breach" claims in the Court of Claims. However, a decision limited to this correct principle might potentially frustrate important purposes of the disputes clause and the governing statute, for a party losing before the administrative board would be permitted to obtain a second evidentiary hearing as to facts concerning its "breach" claim which were not actually litigated and decided administratively. Such a position invites a contractor to split his claims and theories under different headings, reserving some (by way of insurance) for a second round. Yet one of the basic purposes of the Wunderlich Act in providing for finality of factual

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scope of the contract and was therefore a breach of contract. The Court of Claims agreed and, disregarding the administrative settlement, awarded substantial damages to provide the contractor with additional reimbursement for expenses caused by the change order.

A similar case is *Volentine and Littleton* v. *United States*, 144 Ct. Cl. 723. Plaintiff, who had contracted to clear a reservoir site above a dam in construction, complained that the government's closing of the dam before his work was done caused him added work and expense. The contracting officer issued a change order and adjusted the contract price to reimburse plaintiff for this additional expense. The Court of Claims decided that the allowance given by the contracting officer was too small and awarded a substantial additional sum as damages for breach of contract, on the theory that by closing the dam the government had breached an implied contractual obligation not to make the contractor's work more difficult.

findings under the disputes clause was "to require each party to present openly its side of the controversy and afford an opportunity of rebuttal" at the administrative hearings. H. Rep. No. 1380, 83d Cong., 2d Sess., p. 5. As this Court has recognized, the Congressional purpose "would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 717.

Moreover, if the distinction between "breach" and "arising under" claims is accepted, even with the modification that facts once litigated are not to be re-examined *de novo*, the contractor might have the option of short-circuiting the administrative process entirely by suing immediately on a breach theory, thereby avoiding the administrative determination contemplated by the disputes clause. In fact, the Court of Claims has recently sanctioned this procedure in *Universal Ecsco Corp.* v. *United States*, 345 F. 2d 586, despite this Court's rulings that the disputes clause is not "a dead letter to be revived only at the convenience or discretion of the contractor," but the exclusive method of resolving disputes arising under the contract. *United States* v. *Holpuch*, 328 U.S. 234, 239–240; *United States* v. *Blair*, 321 U.S. 730, 735. Accord: *United States* v. *Callahan Walker Construction Co.*, 317 U.S. 56.

4. For the foregoing affirmative reasons we believe, contrary to the assumption of the Court of Claims (R. 144–145), that the standard disputes clause should be read to permit factual issues underlying claims

against the government for breach of contract to be settled by presenting the breach claim administratively, at least so long as the facts are of the kind generally similar to those committed to primary administrative resolution by contract clauses such as those providing administrative relief for "changed conditions," "changes" and "delays." The Court of Claims' assumption to the contrary was apparently based primarily upon its belief that it has become well-established, both in judicial and administrative decisions, ~~but~~ that there is no administrative jurisdiction in such circumstances. We now examine the reasons why we believe that these administrative and judicial decisions do not foreclose this issue in favor of the court's narrow view of the disputes clause.

a. Court of Claims Cases

Prior to the decision of this Court in *United States* v. *Carlo Bianchi & Co.*, the Court of Claims permitted the taking of *de novo* evidence on questions of fact regardless of whether the claim to which those questions pertained had been decided pursuant to the disputes clause. *Carlo Bianchi & Co.* v. *United States*, 144 Ct. Cl. 500, 169 F. Supp. 514; *Volentine and Littleton* v. *United States*, 136 Ct. Cl. 638, 145 F. Supp. 952. Thus the principal importance of the question whether a claim was amenable to administrative resolution lay in determining whether a contractor who had failed to submit his claim for decision under the disputes clause was barred from suit because of failure to exhaust administrative remedies. *E.g., United States* v. *Callahan Walker Construction*

Co., 317 U.S. 56, reversing 95 Ct. Cl. 314; *United States v. Blair*, 321 U.S. 730, reversing 99 Ct. Cl. 71. In the typical case, moreover, it was to the contractor's advantage first to submit his claim to the contracting officer and the administrative review board. For this would give the contractor two bites: a decision favorable to the contractor would usually be accepted by the government (indeed, the government, unlike the contractor, may not take an administrative appeal from the contracting officer's decision), while an unfavorable decision could, to a large extent, be disregarded in a subsequent suit in the Court of Claims.

It is true that, prior to the *Bianchi* decision, the Court of Claims held that the conclusiveness of prior administrative findings hinged on whether or not the claim was a claim for breach of contract; in claims for breach of contract it refused to accord finality to the administrative decision because it held such claims not to fall within the disputes clause. *E.g., Langevin v. United States*, 100 Ct. Cl. 15, 29–31. As we have said, however, this distinction was of small practical significance, for administrative findings under the disputes clause, although theoretically final, had little conclusive effect in practice, as they were subject to review on the basis of a *de novo* record.

The *Bianchi* decision changed this. Under *Bianchi*, the Court of Claims was, for the first time, precluded from taking *de novo* evidence in cases covered by the disputes clause. Thus, for the first time, the scope of the disputes clause potentially determined whether evidence could be taken judicially. *Bianchi* therefore

rendered appropriate a reconsideration of past decisions regarding the scope of that clause in light of the holding of *Bianchi* that uniformity in findings of fact in cases arising under the Wunderlich Act had been part of the legislative purpose underlying that Act.

Secondly, we note that, while the Court of Claims decisions holding breach of contract claims not to be within the disputes clause go back to 1937 (*Phoenix Bridge Co.* v. *United States,* 85 Ct. Cl. 603, 629–30), many of these decisions—especially those decided before 1948—were based on reasoning subsequently rejected by this Court. Prior to 1948, the leading cases were *Phoenix Bridge Company* v. *United States,* 85 Ct. Cl. 603, 629–30, and *Langevin* v. *United States,* 100 Ct. Cl. 15, 29–31. In these cases, the Court of Claims argued that power in the contracting officer finally to decide questions of fact in connection with claims for breach of contract would not be presumed, because it might be inconsistent with the court's exclusive statutory jurisdiction over these matters. And in another leading case, *B–W Construction Co.* v. *United States,* 101 Ct. Cl. 748, 60 F. Supp. 771, reversed on other grounds *sub nom. United States* v. *Beuttas, et al.,* 324 U.S. 768, the Court of Claims held that an administrative decision under the disputes clause denying a claim for breach of contract was not binding because "any agreement made in advance of the controversy which deprives a party of recourse to the courts [for breaches of contract] is contrary to public policy and, therefore, void." 101 Ct. Cl. at 767, 60 F. Supp. at 780. The reasoning of these cases was re-

jected in *United Sates* v. *Moorman,* 338 U.S. 457, where this Court, in holding the contracting officer's decision final, rejected the argument that the parties lack power to contract for the final decision by the contracting officer of questions that would otherwise be decided by the courts.[19]

Similarly, the belief that it would be unfair to require a contractor to have factual disputes underlying breach of contract claims decided pursuant to the disputes clause because of the asserted lack of authority of the executive agencies to settle such claims has, to a large degree, been dispelled by the subsequent decision of the Court of Claims in *Cannon Construction Company* v. *United States,* 319 F. 2d 173, that agencies do have such authority. (See *infra,* p. 52). Lastly, the theory which underlies some Court of Claims cases,[20] that claims for unliquidated damages for breach of contract concern questions of law, so that factual disputes underlying them are not subject to the disputes clause, has been rejected by a later Court of Claims decision which holds, quite properly, that factual disputes are subject to the disputes clause procedure even when they are directly related to an issue of law. *Morrison-Knudsen Co.* v. *United States,* 345 F. 2d 833, 836–837.

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[19] *Langevin* and *B–W Construction Co.* are among the cases relied on below by the Court of Claims (R. 144–145).

[20] *E.g., B–W Construction Co.* v. *United States,* 101 Ct. Cl. 748, 771, 60 F. Supp. 771, 782 (concurring opinion).

b. Administrative Practice [21]

In most cases involving controversies growing out of a contract, as we have indicated above, the factual disputes underlying claims clearly amenable to administrative resolution are the same or substantially the same as those underlying claims formulated judicially as claims for breach of contract. In cases where administrative jurisdiction was clear, of course, the boards have resolved the factual disputes relating to the administrative claims, as the Board did in the case at bar, thus resolving factual disputes also relating to "breach" of contract claims.

In the comparatively rare cases where contractors have asserted before the boards claims for breach of contract, without at the same time asserting "arising under" claims involving the same or similar facts, the practice of the boards has not been consistent. A distinguished observer has recently commended "the blend of ingenuity and search for substantial justice" which has led the contract boards to evolve

[21] Our discussion of administrative practice is addressed primarily to the practice of the Armed Services Board of Contract Appeals (ASBCA) and its predecessors. The ASBCA is the oldest of the administrative contract review boards, with the largest caseload, and the boards of the other procuring agencies are largely modeled after it. Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law and Contemporary Problems 39, 41, 100 (1964). For a survey of the various administrative contract boards and references to the pertinent regulations, see Ablard, *A Survey of the Boards of Contract Appeal in the Federal Government and Their Authority to Decide Contract Disputes*, 30 D.C. Bar Ass'n Journal 64 (1963). The regulations presently governing the Atomic Energy Commission Board of Contract Appeals are set forth at 10 C.F.R. Part 3 (1965).

doctrines affording the contractor relief for virtually all government conduct which can be considered to be a breach of contract.[23] Nevertheless, as Judge Davis notes in his opinion in this case (R. 157, n. 2), the boards have frequently, and perhaps usually, refused to grant relief on "pure" claims for breach of contract, which are typically claims for unliquidated damages for delay caused by the government.

The reasons for this practice may be classified under three headings. In the first place, this Court has repeatedly held that the United States is not liable under standard government contractual provisions for its delays.[24] To a large extent, therefore, the refusal of the boards to grant such relief was merely a reflection of this Court's holdings that the contractor was not on the merits entitled to such relief.[24] Secondly,

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[23] Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A.J. 35, 40 (January, 1966):

"* * * it is appropriate at least to commend the blend of ingenuity and search for substantial justice that has led the board to evolve such doctrines as the constructive or non-formal change order, and the rulings that a contractor has received a constructive and compensable acceleration through government insistence on contract time schedules in the face of excusable delays. These are a current administrative development of justice not dissimilar from the historic advances of the courts of equity."

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[24] *Crook* v. *United States*, 270 U.S. 4; *United States* v. *Rice*, 317 U.S. 61; *United States* v. *Blair*, 321 U.S. 730, 734–735; *United States* v. *Foley*, 329 U.S. 64. Accord: *United States* v. *Croft-Mullins*, 333 F. 2d 772 (C.A. 5) (where there was an express provision precluding liability for damages caused by the Government's delay).

[24] The Court of Claims has distinguished the decisions of this Court on the ground that they did not involve cases in which the government's delay was "unreasonable" or "negligent."

the boards' refusal to consider "pure" breach of contract claims stems from an attempt to comply with the decisions of the Court of Claims thought to preclude such relief. The administrative boards have sometimes been reluctant to subject the parties to the expense of evidentiary hearings in cases where the Court of Claims will disregard the administrative proceedings on the ground that the board lacked jurisdiction and try the issues *de novo*. This practice on the part of the boards therefore adds little support to the decisions of the Court of Claims discussed above. Thirdly, the boards have consistently refused to grant relief on claims for unliquidated damages for breach of contract, in deference to the view that they lack the authority to pay such claims, should they decide them. However, as noted *infra*, pp. 52–54, lack of authority in the administrative boards to grant money relief is not equivalent to lack of authority to make findings of fact, on the basis of which relief may be obtained from either the General Accounting Office or the courts.

On the other hand, the authority under which the boards have been created suggests strongly that they have authority to determine the claims for breach of contract. The first standard disputes clause for government contracts was drafted by an interdepartmental board and put into effect in 1926 (Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law and Contemporary

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Fuller v. *United States*, 108 Ct. Cl. 70, 93–102, 69 F. Supp. 409; *Kehm Corp.* v. *United States*, 119 Ct. Cl. 454, 465–473, 93 F. Supp. 620. This problem has, to a large extent, been obviated by changes in standard clauses in government contracts.

Problems 39, 47–49 (1964)). The procedures followed under the clause were initially extremely informal; the present system of separate boards, following a quasi-judicial procedure, stems back to the establishment of the War Department Board of Contract Appeals in 1942 (Shedd, *op.cit., supra,* at 49–55). Originally, this Board took a very limited view of its jurisdiction. This led Secretary of War Patterson, on July 4, 1944, to issue a memorandum directing the Board to exercise such authority as the Secretary of War himself might exercise when "deemed necessary or desirable to arrive at a just and equitable adjustment or disposition of the dispute involved in the appeal" (9 Fed. Reg. 9463). More specifically, the memoradum directed the Board to

> Find and administratively determine the facts out of which a claim by a contractor arises for damages against the Government for breach of contract, without expressing opinion on the question of the Government's liability for damages.

(*Ibid.;* Shedd, *op.cit., supra,* at 55–56). In 1949, when the present Armed Services Board of Contract Appeals (ASBCA) was established, its charter contained a similar provision regarding claims for "unliquidated damages." [35] The present charter of the ASBCA gives the Board jurisdiction over any claim "cognizable under the terms of the contract," [36] and permits the Board to make findings of fact with

[35] The original ASBCA charter is set forth at 32 C.F.R. 30.1, Part I, Appendix A (1954).

[36] The present language was adopted in the charter effective May 1, 1962. 32 C.F.R. 30.1 Part I, Appendix A, para. 5 (1964 Supp.).

respect to claims not cognizable under the contract, "without expressing an opinion on the question of liability" (32 C.F.R. § 30.1 Appendix A, Part I (1965)).

It is true that, despite the terms of its charter, the ASBCA has frequently refused to exercise its jurisdiction to make findings of fact which relate solely to "breach of contract" claims. As explained in *Simmel-Industrie Meccaniche Societa per Azioni*, A.S.B.C.A. No. 6141, 61-1 BCA ¶ 2917, a case which would have involved the added expense (1961) of hearings abroad:

> Decisions by the Court of Claims have stated that it was not bound by findings of fact made by this Board in appeals involving breach of contract claims. * * * We cannot in good conscience compel the parties to undertake the great expense involved in presenting this matter before us when it must be admitted that our decision or findings of fact may be of no avail to either party.

However, the ASBCA does reserve the jurisdiction to make findings of fact in breach of contract cases where it deems it appropriate. The Board explained in the *Simmel-Industrie* decision: "We interpret our Charter and our Rules to mean that this Board will make findings of fact in [breach of contract] appeals where a hearing on the merits has been completed prior to the filing of a rule to show cause or a motion to dismiss." [27] Recently, the AEC Board

[27] See, *e.g.*, *Armand Cassil*, A.S.B.C.A. No. 438 (June 8, 1950), and *Buttondex Corporation*, A.S.B.C.A. No. 2162 (February 24, 1956). See also *Morrison-Knudsen Co.* v. *United*

of Contract Appeals left open the question whether it would entertain claims for breach of contract. *Fick Foundry Co.*, AEC BCA No. 10-65, 65-2 BCA ¶ 5052. Thus this Board is apparently ready to reconsider its earlier decisions declining jurisdiction, referred to in the majority opinion below (R. 149). And a recent decision of the NASA Board of Contract Appeals apparently asserts jurisdiction for some purposes over claims for breach of contract. *Doyle and Russell, Inc.*, NASA BCA No. 51, 65-2 BCA ¶ 4912.

In sum, the administrative practice, like the decisions of the Court of Claims, does not preclude an application of the *Bianchi* decision to require administrative submission of factual disputes underlying claims against the government for breach of contract.

5. There is a final possible basis for the Court of Claims' assumption that facts cannot be settled administratively in connection with breach of contract claims. It is the court's apparent belief that, as to these claims, the officer or board to whom they would be presented could neither pay the claim nor require

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States, 345 F. 2d 833, 835 (Ct. Cl. 1965), reviewing a decision of the Interior Department's Board of Contract Appeals which made findings of fact on a breach of contract claim over which it held that it had no jurisdiction to grant relief); *The Metrig Corp.*, A.S.B.C.A. No. 8455, 1963 BCA ¶ 3658 ("While the Board does not have jurisdiction to make a determination of liability in case of breach of contract or to reform a contract [the contractor argued that a misrepresentation in the invitation for bids was a breach of contract], the Board does have jurisdiction to examine the evidence and determine whether such evidence supports a conclusion of misrepresentation.").

payment by the government. *Anthony P. Miller, Inc.* v. *United States,* 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212. In our view, this fact—even if true—should not be held to withdraw jurisdiction to decide the factual disputes which underlie breach of contract claims, so long as the facts in issue are of the kind committed to administrative determination by the contract. In addition, we believe that executive departments do in actuality have authority to pay claims for breach of contract once the facts underlying those claims have been established pursuant to the disputes clause.

The decisions of this Court make it clear that the general authority of executive departments to enter into and administer contracts includes the authority to settle and pay claims for breach of contract. In *United States* v. *Corliss Steam-Engine Co.,* 91 U.S. 321, this Court held that a settlement entered into by the Chief of the Bureau of Steam-Engineering, Department of the Navy, in connection with the Navy's termination of a contract in violation of its terms, was binding on the government. Mr. Justice Field pointed out that there are many contingencies when the government finds it in the public interest to suspend work for which the government has contracted, and that "it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors" (91 U.S. at 323). A later case reached the same result in a claim for damages caused by unwarranted delay by the government—precisely the type of claim which the Court of Claims considered

in this case to be outside the authority of the executive departments to adjust under the standard disputes clause. This Court held that the contractor's release, executed in connection with a settlement in which the government paid the contractor $60,000, precluded a suit by the contractor in the Court of Claims for delay damages. *United States* v. *William Cramp & Sons Ship & Engine Co.*, 206 U.S. 118.[28] This conclusion was reached despite the contractor's contention that its claims for "unliquidated damages arising from the breach of the contract on the part of the United States * * * were of such a character that the Secretary of the Navy had neither the right, authority, or jurisdiction to consider, adjust, or pay" (206 U.S. at 124).[29]

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[28] See also *Continental Illinois Nat. Bank. & Trust Co.* v. *United States*, 126 Ct. Cl. 631, 640–41, 115 F. Supp. 892, 897.

[29] The second *Cramp case—William Cramp & Sons* v. *United States*, 216 U.S. 494—has lengthy dictum to the effect that the executive departments may not settle claims for unliquidated damages (216 U.S. at 500–502). However, the Court's opinion made it plain that this dictum applied only where the parties do not follow a settlement procedure set forth in the contract (216 U.S. 502–503). The dictum has no application where the contract establishes a specific procedure—such as the disputes clause—for settling claims for unliquidated damages, and the parties follow this procedure. In the second *Cramp* case, the holding was that the Secretary of the Navy had authority to enter into a release *excepting* a claim for damages resulting from the government's delay. The Court stated, in reliance on the first *Cramp* decision, that "a release executed *in accordance with the terms of the contract* would have extinguished all claims" (216 U.S. at 503, emphasis added). The Court pointed out that the parties in the case before it had not followed specific procedures set forth in the contract for settling and releasing claims (216 U.S. at 502–503).

Indeed the Court of Claims has held, following *United States* v. *Corliss Steam-Engine Company*, *supra*, and the *Cramp* decision, and contrary to the views it expressed in this case, that the executive departments do have general authority to settle claims for breach of contract. *Cannon Construction Company* v. *United States*, 319 F. 2d 173 (holding claim for breach of contract barred by release given in connection with administrative settlement). Moreover, the typical government contract contains several standard clauses permitting the government to take action which would otherwise be a breach of contract, and explicitly authorizing the contracting officer to compensate the contractor for the resulting damage.[30] No one questions the authority of the executive departments to enter into contracts containing such clauses. Similarly, there should be no question as to the authority of the executive departments to grant contractors relief for any breach of contract by the government, in any case where the contractor obtains a favorable decision under the disputes clause procedure.

Finally, if the decision under the disputes clause is adverse to the government, and the executive

[30] For example, one standard clause permits the government to terminate the contract at any time for its own convenience, the contractor being compensated for expenses already incurred under the contract plus a percentage of profit on those expenses. 32 C.F.R. 8.701–704. Another standard clause permits the government to suspend the work at any time for its own convenience, making an equitable adjustment in the contract price to compensate the contractor for any additional expense. 32 C.F.R. 7.105–8.

agency cannot or will not pay, the contractor is free to present his claim to the General Accounting Office on the basis of the administrative findings and record. That office clearly has the authority to settle "[a]ll claims and demands whatever by the Government of the United States or against it." 31 U.S.C. 71. 44 Comp. Gen. 353.[21] The contractor is also free to bring suit on the basis of the administrative findings and record, just as the government does where it sues affirmatively asserting breach of contract by the contractor. *E.g., United States* v. *Hamden Co-operative Creamery Co.*, 297 F. 2d 130 (C.A. 2); *Silverman Bros.* v. *United States*, 324 F. 2d 287 (C.A. 1). If the case is one in which, on the basis of the administrative decision, the executive department would pay if it deemed itself to have such authority, the claim can be paid as soon as the contractor files a complaint in the Court of Claims or a district court, without any further judicial proceedings. For at that point the Department of Justice assumes responsibility for the defense of the suit and has the unquestioned authority to settle the case. Sec-

[21] The Comptroller General's decision announces a readiness to consider claims for breach of contract where the claim is for "the actual costs incurred in excess of the costs which reasonably would have been incurred but for the breach". 44 Comp. Gen. at 358. The Comptroller General further requires that the extra expense "can be administratively determined to a reasonably accurate degree of certainty." *Id.*, at p. 359.

In this decision, the Comptroller General takes the position—in reliance on the decision of the Court of Claims in the case at bar—that only his office has the authority to settle claims for breach of contract, and that the executive departments have no such authority.

tion 5, Executive Order No. 6166 (June 10, 1933); 5 U.S.C. 124–132.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision below, permitting a judicial trial on facts relating to the claims in this case, should be reversed.

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